IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1675

ANTILLES INDUSTRIES, INC.,
Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS; MELVIN H. EVANS, Governor of the Virgin Islands; STANLEY FARRELLY, Chairman of the Virgin Islands Industrial Incentive Board; and REUBEN B. WHEATLEY, Commissioner of Finance,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Antilles Industries, Inc., the petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals For The Third Circuit entered herein January 27, 1976.

OPINIONS BELOW

The Opinion of the Court of Appeals (App. A, pp. 1a-9a) is unreported. The Opinion of the District Court of the Virgin Islands (App. B, pp. 10a-24a) is reported in 388 F. Supp. 315; 11 VI .... (1975).

JURISDICTION

The judgment of the Court of Appeals was entered January 27, 1976 (App. C, p. 25a). A timely Petition for Rehearing was denied by order entered February 19, 1976 (App. D, p. 26a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals in reviewing a decision of the territorial District Court of the Virgin Islands on a matter of local concern may substitute its judgment for that of the territorial court, thereby ignoring the standard of Federal Appellate Review established for decisions of territorial courts in *Waialua Agricultural Co.* v. *Christian*, 305 U.S. 91 (1938).

2. Whether is is constitutionally permissable for the Court of Appeals in reviewing a decision of the territorial District Court of the Virgin Islands on a matter of purely local concern to disregard territorial law and impose a rule of law in conflict therewith.

STATUTES INVOLVED

28 U.S.C. § 1652 provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 676, 62 Stat. 994.

Industrial Incentive Act of 1957 (Act No. 224) is printed in its entirety in Appendix E, pp. 27a-38a.

1 Virgin Islands Code § 4 provides:

> The rules of the common law, as expressed in the restatements of the law aproved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

Restatement of Contracts, as incorporated in 1 V.I.C. § 4, the relevant sections of which are printed in Appendix F, p. 39a.

STATEMENT OF THE CASE

In an effort to encourage new business activity in the territory, the Virgin Islands Legislature enacted the Industrial Incentive Act of 1957, Act 224, which offered tax exemptions and subsidies to qualified enterprises .

Induced by the exemptions and subsidies offered in Act 224, a group of investors established Delaware Watch Co. of the V.I. to manufacture and assemble watches, and having met the qualifications enumerated in the Act, was granted a "Certificate for Tax or Fee Exemptions and Subsidies" for a limited period of ten years. Subsequently, Delaware assigned, for a valuable consideration, all its assets including its Certificate of Tax Exemption to Antilles Industries, Inc., another Vigin Islands watch company.

For reasons unrelated to this petition, which reasons were characterized by the territorial District Court as arbitrary and without authority and which were not considered by the Court of Appeals, the Virgin Islands Tax Exemption Board refused to recognize the assignment.

Following the denial of the transfer, Antilles filed an action charging that the Government had breached its contractual obligations under Act 224.

The territorial District Court, after recognizing that certificates granted pursuant to Act 224 were contracts, applied the substantive law of assignments as set forth in the Restatement of Contracts which is the applicable local territorial law pursuant to Title 1 Virgin Islands Code § 4. (App. F, p. 39a.)

The Restatement of Contracts (App. F, p. 39a) provides that contractual rights are assignable, absent a prohibition, unless it would vary materially the performance under the contract. The court noted the absence of any prohibition, and found as a fact that the assignment would not vary materially performance under the contract. Accordingly, the court held the assignment to be effective.

The Court of Appeals in reviewing the territorial District Court decision refused to apply the territorial law, but chose a different rule of law in conflict with that law; i.e., that such contracts are not assignable in the absence of express permission. The Court of Appeals borrowed this conflicting rule of law from this Court's decisions in *Picard* v. *East Tennessee, Virginia & Georgia Railroad Co.,* 130 U.S. 637 (1889), and *Rochester Railway Co.* v. *City of Rochester,* 205 U.S.

236 (1907). Finding no express permission, the Court of Appeals found the assignment invalid and reversed the territorial court's decision.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS IGNORED THE STANDARD OF FEDERAL APPELLATE REVIEW FOR DECISIONS OF THE TERRITORIAL COURTS ON PURELY LOCAL TERRITORIAL MATTERS ESTABLISHED IN WAIALUA AGRICULTURAL CO. v. CHRISTIAN, 305 US 91 (1938).

The United States purchased the Danish West Indies in 1917. Pursuant to its plenary powers under Article 4, Section 3, Clause 2 of the Constitution, Congress enacted the Act of Congress of March 3, 1917, Ch. 171, § 2, 39 Stat. 1132 (48 U.S.C. 1946 ed. § 1392), which provided for needful Rules and Regulations respecting the Territory. The Act provided *inter alia* for the continuance of the existing judicial system and local laws in force and effect. This judicial system consisted of three inferior courts, or "Lower Courts" and an "Ordinary" or "District Court", which was a local court established under Danish rule with jurisdiction over controversies of every kind. Appeals were taken to the Danish Courts in Copenhagen.[1]

In the Act of 1917, the Third Circuit Court of Appeals in Philadelphia replaced the Danish Court in Copenhagen as the appellate court.[2] It has been held

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[1] *Clen* v. *Jorgenson,* 265 F. 120 (3 Cir. 1920); *U.S.* v. *Malmin,* 272 F. 785 (3d Cir. 1921).

[2] This appellate power of review granted to the Third Circuit Court of Appeals was subject to a series of amendments culminating in the Act of June 25, 1948, c. 646, § 1, 62 Stat. 929, 930, wherein the Court of Appeals was granted jurisdiction over all final decisions of the District Court of the Virgin Islands. *People of the Virgin Islands* v. *Price,* 181 Fed. 2d 394, 397 (3rd Cir. 1950).

that in passing this Act, "Congress intend[ed] . . . to preserve the local laws of the islands and to provide for their enforcement through the local judicial tribunals as then established".[3] Congress in 1936 pursuant to Article 4, Section 3, Clause 2 of the Constitution, enacted the Organic Act of 1936, Act of June 22, 1936, Ch. 699, 49 Stat. 1807, which *inter alia* granted the territorial court known as the District Court of the Virgin Islands appellate review over the judgments and rulings of the inferior courts in the territory. In 1954[4] Congress cloaked the District Court of the Virgin Islands with the authority of a District Court of the United States in federal matters[5] while retaining the court's original jurisdiction over territorial matters. However, this authority and nomenclature did not change this Court from a territorial court to an Article 3 District Court of the United States. *Reynolds* v. *United States,* 98 U.S. 145, 154 (1878); *Mookini* v. *United States,* 303 U.S. 201 (1938). It remains a territorial legislative court created by Con-

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[3] *Clen* v. *Jorgenson,* pp. 122-123, *supra.*

[4] Act of July 22, 1954, ch. 558, 68 Stat. 497, 48 USC 1541.

[5] If the District Court of the Virgin Islands were to be considered strictly a Federal District Court for the purposes of the case at bar, then the Court of Appeals for the Third Circuit was nonetheless in error for failing to accord the appropriate deference and great weight to the decision of a lower federal court in interpreting a statute dealing with a purely local matter.

> When not instructed by some decision of a state court, we are disposed, in exercising appellate jurisdiction, to accept the construction given by the lower federal court to a statute of the State, particularly when that court is composed as in this instance, wholly of citizens of the State, familiar with the history of the statute, the local conditions to which it applies, and the character of the State's laws. *Thompson* v. *Consolidated Gas Utilities Corp.,* 300 U.S. 55 (1937) pp. 74-75.

gress pursuant to Article 4, Section 3, Cl. 2 of the Constitution. *O'Donoghue* v. *United States,* 289 U.S. 516 (1933).

Congress enacted the Judiciary Act of September 24, 1789, C. 20, 28 U.S.C. § 725, now 28 U.S.C. § 1652, known as the Rules of Decision Act, requiring that state law be followed in the federal courts in order to obtain uniformity of decisions between the state courts and the federal courts sitting in the states.

Erie v. *Tompkins,* 304 U.S. 64 (1938), furthered this goal by declaring that state law, within the context of the Rules of Decision Act, encompassed not only legislative enactments, but also included decisional law of state courts. This underlying policy of the Judiciary Act as expressed in *Erie* v. *Tompkins, supra,* applies with equal force to territorial law and decisions by territorial courts, *Waialua Agricultural Co.* v. *Christian,* 305 U.S. 91 (1938), where the Court stated at p. 109

> While the 34th section of the Judiciary Act is not applicable to territories, the arguments of policy in favor of having the state courts declare the law of the state are applicable to the question of whether or not territorial courts should declare the law of the territories with the least possible interference.

In conformity with these considerations the Supreme Court established in *Waialua* a narrow standard of review for Courts of Appeals holding that the Courts of Appeals were not to interfere with the decisions of the territorial tribunals unless manifestly erroneous.

In *Sancho* v. *Texas Co.,* 308 U.S. 463 (1940), this Court repeated the admonition that careful and consistent adherence to the legislative and judicial policy

of deference to the local laws and tribunals is founded on sound policy. The Court stated at 471:

> To reverse a judgment of a [local] tribunal on such a local matter as the interpretation of an act of the local Legislature it would not be sufficient if we or the Circuit Court of Appeals merely disagreed with that interpretation. Nor would it be enough that the [local] tribunal chose what might seem on appeal to be the less reasonable of two possible interpretations. And such judgment of reversal would not be sustained here even though we felt that of several possible interpretations that of the Circuit Court of Appeals was the most reasonable one. *For to justify reversal in such cases the error must be clear or manifest; the interpretation must be inescapably wrong, the decision must be patently erroneous.* (Emphasis supplied.)

In holding the tax exemption certificate to be a contract and to be validly transferable under the same conditions as contracts generally, the territorial court analyzed the substantive law and the legislative purpose of the Act, and held that a determination upholding the validity of the transfer would better serve the purpose of the Act, and would be consistent with the prior opinion of the territorial Attorney General that the Legislature did not intend to prohibit such assignments.[6] This conclusion is also in accord with similar decision of the territorial Supreme Court in neighboring Puerto Rico holding that similar certificates were transferable under the Puerto Rico Act which was also silent on the issue of assignment.[7]

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[6] 4 V. I. Op. Atty. Gen. 29.

[7] *Buscaglia, Treas.* v. *Tax Court,* 66 P.R.R. 670 (1946).

The Court of Appeals ignored the territorial court's analysis and exercised its judgment to apply a rule that transfers are prohibited absent permission. Although the Court of Appeals may prefer this rule[8] the conclusion of the territorial District Court that the certificate was assignable was not manifestly or patently erroneous, nor was it inescapably wrong. Rather, it was not only a permissible interpretation of the territorial law, it was absolutely correct and in substituting its judgment for that of the judgment of the court vested with the authority to interpret territorial law, the Court of Appeals for the Third Circuit ignored the injunction of this Court in *Waialua, supra,* that decisions of territorial courts in matters of territorial concern should not be disturbed in the absence of manifest error.

II. THE CONSTITUTIONAL PRINCIPLES EMBODIED IN SECTION 34 OF THE JUDICIARY ACT OF 178[illegible]. THE POLICY OF WHICH WAS EXTENDED TO THE TERRITORIES IN WAIALUA, REQUIRE THAT THE COURT OF APPEALS ADHERE TO TERRITORIAL SUBSTANTIVE LAW ON MATTERS OF PURELY LOCAL CONCERN.

Congress, by Section 8 of the Revised Organic Act of the Virgin Islands, approved July 22, 1954, 68 stat. 501; Title 48 U.S. Code § 1574, vested the legislative power of the Virgin Islands in a local Legislature designated the "Legislature of the Virgin Islands." Section 8 (e) authorized the Legislature to enact new laws and amend, alter, modify or repeal any local law or ordinance.

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[8] The constitutionally impermissible nature of the effort by the Court of Appeals to enforce its preference is discussed in Point II, *infra,* together with the territorial rules of substantive law applicable to the assignment.

On May 16, 1957, the Legislature of the Virgin Islands enacted the Virgin Islands Code, which is the official statement of the local laws and ordinances in force in the Virgin Islands.

Title 1, § 4 of the Virgin Islands Code provides:

> The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

As pointed out in Point I, *supra,* the 34th Section of the Judiciary Act of September 24, 1789 c.20-28 U.S.C. § 725 now 28 U.S.C. § 1652, requires that federal courts, when passing on state or territorial matters of a purely local concern, must apply both the statutory and decisional law of the state or territory.[9] In *Erie*, Justice Brandeis pointed out the constitutional basis for this imperative, noting that no clause in the Constitution purports to confer a power upon the federal courts to declare substantive rules of common law applicable to a state.

The issue before the territorial court was the assignability of a contract created by the territorial Legislature granting a tax exemption for a limited period. The court pursuant to § 4 of Title 1 of the V.I. Code, relied on the relevant provisions of the Restatement of Contracts, together with the general law of assignments, which provides that contractual rights are assignable absent a prohibition in the contract unless the assignment would vary materially the performance

[9] *Swift* v. *Tyson,* 16 Pet. 1 (1842); *Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64 (1938); and *Waialua Agricultural Co.* v. *Christian,* 305 U.S. 91 (1938).

of the parties.[10] Applying these tests, the court found that the Legislature did not intend to prohibit transfers and that the performance of Antilles would not vary materially from that of Delaware.

The Court of Appeals in reversing the territorial Court selected a rule in conflict with the territorial law, i.e., that such contracts are not assignable in the absence of express permission, and not only ignored the territorial law but went so far as to hold that the territorial court erred in applying local law.

The constitutional basis for the injunction discussed in *Erie* by Justice Brandeis compels that the rule of law which the Court of Appeals seeks to impose on the territorial Court must fall, no matter how persuasive, reasonable, or "better" that rule may be. As Chief Justice Warren explained in *Hanna* v. *Plumer,* 380 U.S. 460 (1965) at p. 471-472:

> We are reminded by the Erie opinion that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article 1 or some other section of the Constitution; in such areas state law must govern because there can be no other law.

Accordingly, the Court of Appeals incorrectly and impermissably borrowed language from this Court's decisions in *Picard* v. *East Tennessee, Virginia & Georgia Railroad Co.,* 130 U.S. 637 (1889) and *Rochester Railway Co.* v. *City of Rochester,* 205 U.S. 236 (1907) to formulate a rule of law in conflict with the territorial law, thus violating the constitutional command of Section 34 of the Judiciary Act of 1789.

[10] App. F, p. 39a.

CONCLUSION

For the foregoing reasons Antilles Industries, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals below upon plenary briefing and argument. Alternatively, Antilles Industries, Inc. respectfully prays that this Court summarily vacate the judgment below and reinstate the judgment of the District Court of the Virgin Islands pursuant to *Waialua Agricultural Co.* v. *Christian, supra.*

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 75-1176

No. 75-1458

ANTILLES INDUSTRIES, INC., *Appellee*

v.

GOVERNMENT OF THE VIRGIN ISLANDS; MELVIN H. EVANS, Governor of the Virgin Islands; STANLEY FARRELLY, Chairman of the Virgin Islands Industrial Incentive Board, and REUBEN B. WHEATLEY, Commissioner of Finance, *Appellants*

APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS DIVISION OF SAINT CROIX

(D.C. Civil No. 423-1970)

Argued December 1, 1975

Before: ALDISERT, WEIS and GARTH, *Circuit Judges.*

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Opinion of the Court

(Filed January 27, 1976)

WEIS, *Circuit Judge.*

The payment of taxes is one of the expected responsibilities of citizenship. In order to preserve a resigned, if not a cheerful, acceptance of that burden, policy dictates that any waiver of the obligation by statute be not extended beyond that expressly allowed. Accordingly, in this appeal, we construe the terms of tax exemption legislation to say no more than the wording requires. Since the enactment did not speak to a right of assignment, we find none existed and vacate the district court judgment which held otherwise.

In an effort to encourage new business activity in the territory, the Virgin Islands Legislature enacted the Industrial Incentive Act of 1957, Act 224, which offered tax exemptions and subsidiaries to qualified enterprises. The Delaware Watch Company was granted such an exemption on December 7, 1961, effective as of December 16, 1960 and valid for a period of ten years thereafter. As a result, the company was not required to pay excise or gross receipts taxes and it received non-taxable subsidies equal to 75% of the income taxes and 100% of the import duties which it paid into the Treasury of the Virgin Islands. Shortly afterward, Delaware encountered financial difficulties. In June, 1962, it informed the Governor that it was ceasing business, but hoped to resume operations at some time in the future. Although the company continued to file annual reports, it did not resume its manufacturing activities.

Plaintiff Antilles Industries, Inc., a wholly-owned subsidiary of General Time, Inc., began to manufacture watches on St. Croix in 1961. On November 6, 1963 it applied for a tax exemption but a decision on its request, as well as on those of eleven other watchmaking com-

panies,[1] was deferred. Fearing that an influx of timepieces to the United States would imperil import policies favorable to Island industry, the Governor applied a "freeze" on further exemptions for watchmaking concerns.

Antilles then arranged to secure an assignment of Delaware's exemption. On March 26, 1965, pursuant to the Act of 1961, 33 V.I.C. § 4106,[2] Antilles petitioned the Tax Incentive Board for a transfer of Delaware's certificate. On April 6, 1965, Delaware executed a "general assignment and bill of sale" which purported to sell all of its "business and properties (other than its cash)" to Antilles for a consideration of $28,700.00. Nothing in the record suggests whether Delaware had anything to transfer other than its certificate.[3]

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[1] Before that time, a total of 5 exemptions, including Delaware's, had been issued.

[2] The Act of November 3, 1961, No. 798, became effective on January 1, 1962. It repealed Act 224, but provided that no tax exemptions granted under that statute would be affected. However, there was to be no enlargement or expansion of the pre-existing exemptions.

A continuing source of confusion throughout these proceedings was the failure of both Antilles and the Government to recognize that the Delaware exemption had been issued under the terms of the 1957 legislation, Act 224. The provision codified at 33 V.I.C. § 4106, which allowed transfer of an exemption by the Tax Incentive Board, was part of the 1961 Act and did not appear in the 1957 enactment. Consequently, the provision for transfer did not apply to the Delaware certificate. *See* Vitex Manufacturing Co. v. Government of Virgin Islands, 351 F.2d 313, 316 n.4 (3d Cir. 1965).

[3] The balance sheet of Delaware as of December, 1962 showed a merchandise inventory of $545.00. The only other assets listed were $364.00 cash in bank, loans receivable of $14,800.00, and an industry subsidy receivable of $1,878.24. A profit and loss statement for the same year included as other income the sale of fixed assets, $15,850.00. On the record in this case it is difficult to escape the conclusion that in fact nothing other than the exemption certificate was sold to Antilles in 1965.

On August 5, 1965, Antilles withdrew its request for transfer of the Delaware certificate, but on September 27, 1968, resubmitted its petition.[4] On May 7, 1969, the Board held a hearing to determine if the Delaware certificate should be revoked. The record does not reveal whether such an order was in fact issued. On July 22, 1970, the Board wrote to the Governor stating that there was "no outstanding or active business [of Delaware] on which to predicate a transfer notwithstanding the eligibility of the applicant [Antilles]." The Governor agreed with the Board and denied Antilles' application.

Plaintiff then filed suit in the district court. Following the submission of an agreed statement of facts, the district court decided that (1) the exemptions were assignable; (2) Antilles was the lawful assignee of Delaware's exemption as of April 6, 1965; and (3) it was entitled to a refund of taxes paid thereafter. In a subsequent proceeding, the court entered a judgment fixing the amount of the refunds at $2,232,286.38 plus interest and awarding counsel fees.

The issue on appeal is simply whether an exemption granted under the 1957 Act is assignable. The district court, recognizing that the statute was silent on that point, held that such exemptions were transferable. It reasoned that since under the Act an exemption was "in the nature of a contract," traditional contract principles permitting

[4] In a letter requesting resubmission, Antilles stated that one of the considerations for the withdrawal of its petition in August, 1965 was the decision of the district court of the Virgin Islands in Virgo Corporation v. Paiewonsky, 251 F. Supp. 279 (D. V.I. 1966). Had the holding in that case remained in effect, Antilles would have been entitled to the exemption in its own right (under its 1963 request). The judgment in *Virgo*, however, was reversed by this court in the following year, 384 F.2d 569 (3d Cir. 1967).

Since the opinion of the district court in the *Virgo* case was dated March 14, 1966, it appears likely that the filing of the suit rather than that decision, furnished the impetus for Antilles' action in August, 1965.

assignment should govern. We disagree with that analysis because it did not utilize the proper standards for interpreting tax exemption legislation.

"In the interpretation of statutes, the function of the court is easily stated. It is to construe the language so as to give effect to the intent of [the legislature]." *United States* v. *American Trucking Ass'ns,* 310 U.S. 534, 542 (1940) (footnote omitted). On several occasions, we have stated the basic rule of construction which is to be applied in claims of tax exemption. In *King Christian Enterprises, Inc.* v. *Government of the Virgin Islands,* 345 F.2d 633 (3d Cir. 1965), Judge Maris wrote:

> "It is a well settled rule that statutory exemptions from taxation, being a matter of grace, are to be strictly and narrowly construed." (citations omitted) 345 F.2d at 637.

In *Tracey Leigh Development Corp.* v. *Government of the Virgin Islands,* 501 F.2d 439, 443 (3d Cir. 1974), Judge Adams repeated that language with approval, and added:

> "This rule, when compounded with the precept that 'to supply [statutory] omissions transcends the judicial function,' makes the present case—a case involving a tax exemption—a particularly inappropriate occasion for judicial tampering with the clear language of a statute." (footnote omitted).[5]

Viewed in the light of the correct rule of construction, therefore, the absence of any reference to assignability

[5] Our opinion in Vitex Manufacturing Co. v. Government of the Virgin Islands, *supra*, is distinguishable. While there the language in the exemption legislation was construed against the drafter in accordance with the contractual rule, the statute contained verbiage which is pertinent. Here, there is a total lack of any wording in the statute on the crucial issue and, hence, no language to construe.

takes on particular significance in assertaining the intent of the legislature. In the context of tax exemptions, silence implies not permission, but denial of authorization. We do not find in the Act a legislative intention to include a right of transfer. Historically in the Virgin Islands, such permission has been articulated. For example, the predecessor legislation, Bill 293 (1954) of the Municipal Council of St. Thomas and St. John, provided at § 3(e):

> "In the event of sale, transfer or assignment of any tax exempt or subsidized business or industry hereunder, the exemption or subsidy granted shall not be extended beyond the period originally authorized."

By implication then, exemptions granted under that Act could be assigned—at least in connection with the transfer of the business to which it had been granted.

Act 798, 33 V.I.C. § 4106, the 1961 statute which succeeded Act 224, contained a provision for limited transferability after approval by a governmental board.

Thus, both before and after Act 224 transferability was expressed in statutory terms. The legislature has demonstrated that, when it choose to permit transferability, it knew how to do so. In these circumstances there is no principle of logic commanding the conclusion that, by absolute silence on the subject of transferability, the legislature meant to include it. Indeed the contrary conclusion is compelling, to-wit, that the legislature did not wish to provide transferability of Act 224 exemptions. *See Vitex v. Government of the Virgin islands, supra.*

It may be argued that the Act of 1961, in allowing a qualified right of transfer, was meant to narrow a much wider privilege implied in the 1957 legislation. But it is far more consistent to adopt the contrary view and to regard the 1961 provisions as a step toward liberalizing the negative feature of the earlier enactment.

Antilles contends that, since the statute refers to an exemption as being "in the nature of a contract" and generally contracts are assignable, therefore an exemption is transferable. We do not accept the proposition that a tax exemption is an ordinary contract, and, examined in context, the statutory language is not to the contrary.

The Act was intended to entice new business to the Islands with the promise of a favorable tax treatment. To assure prospective entrepreneurs that there would be no change in the rules of the game after the initial investments, the legislature provided that:

> "(e) In order that the encouragement tendered by this Act in the form of subsidies for the promotion of the business and industrial development of the Islands may be an incentive, having a real and unmistakably sure basis, the Government of the Virgin Islands hereby declares that it considers all orders granting subsidies and tax exemptions made available under the provisions of this Act as being in the nature of a contract or agreement between the Government of the Virgin Islands and the persons or corporations receiving the benefit of the subsidies or tax exemptions, and that it will not adopt any legislation which may impair or limit such subsidies or tax exemptions granted hereunder or which may defeat the purpose of this Act." Act 224.

The statute thus establishes an arrangement which would not allow impairment of benefits once conferred to be diminished by legislative after-thought—a desirable protection for a prospective investor. But it does not follow that he is free to pass on to others what has been granted to him.

The personal nature of a tax exemption has been discussed by the Supreme Court in terms still appropriate today although the opinions were handed down many years ago. In *Picard* v. *East Tennessee, Virginia & Georgia Railroad Co.*, 130 U.S. 637, 641 (1889), the Court said:

> "Yielding to the doctrine that immunity from taxation may be granted, that point being already adjudged, it must be considered as a personal privilege not extending beyond the immediate grantee, unless otherwise so declared in express terms. The same considerations which call for clear and unambiguous language to justify the conclusion that immunity from taxation has been granted in any instance must require similar distinctness of expression before the immunity will be extended to others than the original grantee."

Rochester Railway Co. v. *City of Rochester*, 205 U.S. 236, 247 (1907), further explained:

> "This court has frequently had occasion to decide whether an immunity from the exercise of governmental power which has been granted by contract to one, has by legislative authority been vested in or transferred to another, and in the decisions certain general principles, which control the determination of the case at bar, have been established. Although the obligations of such a contract are protected by the Federal Constitution from impairment by the State, the contract itself is not property which, as such, can be transferred by the owner to another, because, being personal to him with whom it was made, it is incapable of assignment. The person with whom the contract is made by the State may continue to enjoy its benefits unmolested as long as he chooses, but there his rights end, and he cannot by any form of conveyance transmit the contract or its benefits, to a successor." (citation omitted)

Later, the Court recited this language with approval in *Morris Canal and Banking Co.* v. *Baird*, 239 U.S. 126, 131 (1915). *See also* 173 A.L.R. § 118 (1948).

In substance then, the Supreme Court cases establish that a tax exemption is personal to the entity to which it was granted, and unless the legislation so provides, the privilege may not be assigned to another.[6] That being so, the district court erred in applying the usual principles of contract law favoring assignability.

Because we have found no right of assignability under Act 224, we need not address the question of irregularities during the administrative proceedings concerning the transfer. The 1961 Act did not affect the exemptions granted under the 1957 legislation. Consequently, Antilles' petition for transfer and the Government's actions thereafter were nullities.

The judgment of the district court will be vacated, and we will enter judgment for the defendants.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[6] The district court in indicating that "[t]he general law of assignments" required "that in the absence of language prohibiting assignments, claims against the Government are freely assignable" relied upon Webster v. Luther, 163 U.S. 331, 341 (1896). That case involved the pre-entry assignment of lands granted to a Civil War veteran's widow under a special homestead act. The unique nature of a tax exemption distinguishes the case at bar and we find the district court's reliance on *Webster* was misplaced.

APPENDIX B

DISTRICT COURT, VIRGIN ISLANDS,
D. ST. CROIX.

Civ. No. 70-423.

ANTILLES INDUSTRIES, INC., *Plaintiff*,

v.

GOVERNMENT OF THE VIRGIN ISLANDS ET AL., *Defendants*.

Jan. 21, 1975.

Isherwood & Colianni, Christiansted, St. Croix, V. I., Thomas Alkon, Christiansted, St. Croix, V. I., of counsel, for plaintiff.

Donald M. Bouton, Asst. Atty. Gen., Saint Thomas, V. I., for defendants.

Memorandum Opinion and Judgment

WARREN H. YOUNG, District Judge.

I

BACKGROUND FACTS

Antilles Industries, Inc. (herein "Antilles") brings this action against the Government of the Virgin Islands (herein "Government") for the breach of a contract originally entered into between the latter and Delaware Watch Company (herein "Delaware"). On December 7, 1961, pursuant to the provisions of Act No. 224, the Government granted Delaware a "Certificate for Tax or Fee Exemptions and Subsidies", which was to be effective for a period of ten years commencing on December 16, 1960. Delaware engaged in the manufacture and assembly of watch movements until August, 1962, when it halted production due to financial difficulties. Remaining dormant throughout the ensuing period of time, Delaware, warranting that its tax certificate was in good standing, sold all of its assets to Antilles on April 6, 1965, by execution of a Bill of Sale

which purported to include *inter alia* Delaware's claim to tax exemptions and subsidy benefits.

Prior to the acquisition, Antilles, also actively engaged in the watch business, wrote to the Attorney General of the Virgin Islands, noting its intention to purchase Delaware's watch production business and requesting verification as to its eligibility to succeed to the unexpired portion of Delaware's certificate. On February 15, 1965, the Acting Attorney General responded by suggesting that the proposed assignment fell within Section 4106 of Act 798, but added that approval thereof by the Board was necessary.

On March 26, 1965, Antilles submitted an application to the Board for the transfer of the Delaware certificate. The Board failed to act on the application for transfer for five months, at which time Antilles withdrew its application, but reserved the right to reapply. This right of reapplication was acknowledged by the Board in a letter dated August 10 of the same year.

During the pendency of its application for transfer, Antilles submitted an independent application for a Certificate of Tax Exemption and Subsidies in its own right. The withdrawal of the application for transfer, then, amounted to a strategic assessment by Antilles that the pendency of both applications might jeopardize action on its application for an independent grant. On September 27, 1968, after its application for an independent grant was denied by the Governor, Antilles reapplied for approval of the transfer of Delaware's certificate.

Seven months later, the Government published a notice for Delaware to appear and show cause why its certificate should not be revoked for failure to engage in the business for which the tax benefits were granted. On May 7, 1969, Antilles appeared by counsel and with witnesses prepared to prove its entitlement to the benefits of Delaware's certificate by virtue of the aforementioned assignment. The

Board, however, refused to hear testimony, asserting that the issue noticed was the revocation of Delaware's certificate rather than the validity of the transfer thereof. Additionally, the Board determined that Antilles lacked standing to present evidence on the issue of revocation. On November 4, 1969, the Board met in Executive Session without having scheduled a subsequent hearing and agreed to recommend that the application for transfer of Delaware's certificate to Antilles be denied. Almost one year later on October 27, 1970, Governor Evans notified Antilles that its application for transfer was denied, at which time the instant action was commenced.

II

Transferability of Act No. 224 Certificates

Act No. 224, under which Delaware was granted its certificate, was replaced on January 1, 1962, by Act No. 798. Throughout their correspondence and continuing up to the commencement of this action by Antilles, both Antilles and the Government assumed incorrectly that Section 4106 of Act No. 798 [1] governed the transferability of Delaware's Tax Exemption Certificate. This assumption, however,

[1] Section 4106 reads:

> A certificate of tax exemption and/or subsidy benefits granted under the provisions of this subtitle may be transferred, for the unexpired portion of the term of the certificate, to another person, firm, or corporation who, or which, succeeds the beneficiary in carrying on, or in operating, the tax exempt business, upon determination by the Board that such person, firm, or corporation is otherwise qualified to receive such benefits and provided the industrial or business activity with respect to which the certificate was granted, is continued by said person, firm or corporation. Thereafter, the transferor of the certificate shall lose all tax exemption and subsidy benefits under this subtitle and shall be subject to the operation of the tax laws of the Virgin Islands.—Added Nov. 3, 1961, No. 798, § 2, Sess.L.1961, p. 260; March 26, 1963, No. 990, § 1, Sess.L.1963, p. 217.

ignored Section 4115 of the same act, which reads in pertinent part:

> "Nothing in this Act shall be construed to affect in any manner any tax exemption or subsidies heretofore granted under laws existing prior to the effective date hereof".

See also Vitex Mfg. Co., Ltd., v. Government of the Virgin Islands, 5 V.I. 429, 434-35 n. 4 (3d Cir. 1965).

Unlike Act No. 798, its predecessor is devoid of any provision regarding the transferability of certificates, thereby raising difficult questions of statutory interpretation and legislative intent. Any meaningful interpretation of either statute, however, must begin with the important maxim that once a certificate granting subsidies has been issued by the Governor, a binding contract between the territory and the taxpayer arises. *See* Act No. 224, § 1(e), V.I. Sess. Laws (1957); Act No. 798 T. 33 V.I.C. § 4001(b) (1962); Virgo Corp. v. Paiewonsky, 6 V.I. 256, 286-87 (3rd Cir. 1967); Vitex Mfg. Co., Ltd. v. Government of the Virgin Islands, 5 V.I. 429, 435 (3rd Cir. 1964); Pentheny, Ltd. v. Government of the Virgin Islands, 5 V.I. 575, 585 (3rd Cir. 1964). Relying heavily on the contractual nature of Delaware's grant, Antilles proposes that the tax exemption certificate, like any contract right, should be fully assignable.

In its brief, the Government has raised two objectives to Delaware's attempted assignment of the benefits received under its certificate—

(1) the respectable authority in this jurisdiction which has deemed tax exemptions under the Industrial Inventive Act to be matters of legislative grace and thus to be strictly construed against the taxpayer [*see* Tracy Leigh Development Corp. v. Government of the Virgin Islands, 501 F.2d 439, 443 (3d Cir. 1974); King Christian Enterprises, Inc.

v. Government of the Virgin Islands, 345 F.2d 633, 637 (3d Cir. 1965)];

(2) the prohibition, found in Section 160(3)(a) of the Restatement of Contracts, against assigning contracts in which performance by the assignee would vary materially from that of the assignor.

A.

In response to the Government's first assertion, I find the doctrine of *strictissimus juris* inapplicable to the instant case.[2] Preliminarily, it is helpful to put the rule in its proper perspective. Far from compelling immediate surrender to its dictates whenever an ambiguity arises, the rule of strict construction should be employed as an element of decision only when the court has exhausted its experience by attempting other tests of meaning. It is, therefore, not a substitute for all other rules. Citizens' Bank v. Parker, 192 U.S. 73, 85-86, 24 S.Ct. 181, 48 L.Ed. 346 (1904).

Unlike the *Tracy Leigh* and *King Christian* cases in which the Third Circuit employed the rule, this Court is not presented with solely a problem of statutory construction but rather is aided by both substantive law and legislative purpose. The general law of assignments, for example, states that in the absence of language prohibiting assignment, claims against the Government are freely assignable. Webster v. Luther, 163 U.S. 331, 341, 16 S.Ct. 963, 41 L.Ed. 179 (1896). In People ex rel. Stone v. Nudelman, 376 Ill. 535, 34 N.E.2d 851 (Ill. 1941), the Supreme Court of Illinois confronted the rule requiring strict construction

[2] The precedential impact of these authorities is somewhat neutralized by the decisions which have held that because the Government has declared the grants to be in the nature of a contract, any ambiguity in the statute must be construed against its draftsman, the Government. *See* Vitex Mfg. Co., Ltd. v. Government of the Virgin Islands, *supra*, at 435; Tumex Corp. v. Government of the Virgin Islands, Civ. No. 160/70, at 4 (D.V.I. 1970).

of a tax refunding statute in the context of an assignment of a credit memorandum. The credit memorandum, issued by the Department of Finance for the erroneous payment of a retailers' occupation tax, was transferred by the grantee-company to an assignee for the benefit of creditors. Noting that the refunding statute on which the issuance of the credit memorandum was based was silent on the issue of transferability, the Court declined to apply the doctrine of strict construction, in favor of the rule upholding the free assignability of claims against the Government. *Id.* at 853. The foregoing decision is entirely consistent with the weight of authority which provides that in the absence of an express statutory prohibition against assignment, the assignability of a claim for tax refund should be sustained. *See* Crawford County Trust & Savings Bank v. Crawford County, 66 F.2d 971, 972-73 (8th Cir. 1933); 51 Am. Jur. (Taxation) § 1182, at 1015; Annot., 134 A.L.R. 1202.

An additional, even more compelling, reason for not invoking the technical rule of construction is that to do so would vitiate the important policies underlying Act No. 224. For, the rule is not to be applied where the real intent of the statute can be gathered from the Act itself. *See* State v. Taylor, 80 So.2d 618, 621 (Ala. 1955); Chicago Home v. Carr, 300 Ill. 478, 133 N.E. 344 (Ill. 1921). As expressed in the Preamble and Declaration of Policy of Act No. 224, the purpose of the statute is to promote the local economy and to provide steady employment to the people of the Virgin Islands by aiding and encouraging new and existing business enterprises. It is difficult to conceive in what way the economy of the Islands would be harmed by permitting a marginally successful or defunct enterprise like Delaware to transfer its tax exemptions and subsidies to Antilles, a profitable business which would not only preserve the jobs created by its predecessor company but also maintain a high level of investment and capital input. *Cf.* Tumex v. Government of the Virgin Islands,

Civ. No. 160/60, at 3 (D.V.I. 1970). To irretrievably tie up a valuable tax exemption certificate in a corporation that has ceased operating with almost eight years remaining on its grant can only be termed counterproductive from an economic standpoint.

Responding to an inquiry made by the Tax Exemption Board regarding the transferability of tax exemption certificates issued pursuant to Act No. 224, the Attorney General of the Virgin Islands suggested that the Legislature did not intend to prohibit assignment. Analyzing the policies of the Act from the standpoint of a potential investor, he noted that:

> "[i]f . . . an investor could look forward to the loss of the special rights upon the sale of the business, he would be far less willing to invest his money here. So, likewise, would be a future investor by way of a purchaser of an existing business. Upon purchase, he would lose the benefits of the original owner."

4 V.I.Op. Atty. Gen. 29, Op. No. 1960-17 (Apr. 28, 1960).

In a recent appeal from this Court, the Third Circuit emphasized the importance of the reasonable expectations of applicants under the Industrial Incentive Act seeking to establish new businesses in these Islands. Noting that the Legislature deemed the tax exemption grant to be a contract to assure companies that their rights thereunder were vested and thus did not rest on gossamer nations of legislative whim, the Court held that:

> "to deny taxpayers who were induced to establish new businesses in the Virgin Islands the benefits they reasonably anticipated receiving would do immeasurable harm to the economy of the territory and render uncertain indeed its prospects of attracting any additional investment".

HMW Indus., Inc. v. Wheatley, 504 F.2d 146 at 155 (3d Cir. 1974), *citing* this Court's opinion in 368 F.Supp. 915,

919-20 (D.V.I. 1973); *see also* Vitex Mfg. Co., Ltd. v. Government of the Virgin Islands, *supra* 5 V.I. at 434-35 n. 4.

Given the unequivocal declaration of the Legislature that the arrangement between Delaware and the Government was contractual, plus the lack of statutory prohibition against assignment, Delaware could reasonably expect that the validity of any subsequent transfer of its grant would be governed by the law of contracts. Despite its dormancy, Delaware maintained its status as a Virgin Islands corporation and continued to pay franchise taxes and file annual reports. It then entered into an arms length transaction with Antilles to transfer the certificate, and both parties gave notice to the Government of the proposed transfer. The foregoing action by Delaware was entirely consistent with its reasonable expectation that its tax certificate was a valuable and transferable asset. In addition, the letter dated February 15, 1965, in which the Acting Attorney General advised Antilles that the proposed assignment appeared to be statutorily sanctioned, added further fuel to Delaware's expectations.

B.

I now turn to the Government's claim that Restatement of Contracts, Section 160(3)(a) prohibits the transfer of Delaware's grant. Section 160(a)(3) provides in pertinent part:

> "Performance . . . by a person delegated has the same legal effect as performance . . . by the person named in the contract, unless . . . performance by the person delegated varies or would vary materially from performance by the person named in the contract as the one to perform . . . ".

The validity of an assignment, then, depends on whether it makes a substantial difference to the Government whether its performance is to be rendered by Delaware or Antilles. *See* Simpson, Contracts § 127, at 267 (1954).

The Government argues that in return for the generous subsidies and exemptions afforded by the Act, the taxpayer must respond with corresponding duties; that is, the taxpayer's industry or business must promote the public interest by furthering the economic development of the territory. Since the extent to which one enterprise's activities benefit the economy, the argument continues, will normally differ substantially from that of another business, the contract is personal and thus non-assignable. For the reasons stated herein, I must disagree with the foregoing analysis.

A thorough reading of Act No. 224 convinces me that the considerations involved in the Government's granting or denying exemptions and subsidies under the statute are fundamentally objective in nature.[3]

This view is buttressed by a comparison of Act No. 224 with its successor, Act No. 798. Outlining the criteria required of applicants under 798, Section 4041 of Title 33 of the V.I. Code reads:

> "A person, firm, or corporation, engaged in or about to engage in an industrial or business activity in the Virgin Islands, *which industrial or business activity, in the judgment of the Governor of the Virgin Islands will promote the public interest by economic development of the Virgin Islands,* may apply for the same . . .". (Emphasis added.)

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[3] The Act requires only (1) that a business seeking exemptions and subsidies thereunder have "an actual and demonstrable capital investment of at least Ten Thousand ($10,000.00) Dollars", (2) that the product in which the business deals not have been manufactured, processed, created or produced within the Virgin Islands prior to January 1, 1947, (3) that "[n]ot less than seventy-five (75%) per cent of all persons employed in any new industry . . . be legal residents of the Virgin Islands", and finally (4) that to be eligible a person has to be a registered voter and domiciled in the Virgin Islands, while a corporation has to be organized under the laws of the Virgin Islands.

The provision, which essentially grants to the Governor authority to weigh subjective factors in determining whether a business should be granted exemptions [*see* Virgo Corp. v. Paiewonsky, *supra,* at 288-89], is important for purposes of the instant case only insofar as it is absent from its predecessor statute. By adding subjective factors to the 1961 amendments, which the Legislature could have included in the 1957 Act, it is strong evidence that the Legislature intended no such interpretation of the prior law. Vitex Mfg. Co., Ltd. v. Government of the Virgin Islands, *supra,* 5 V.I. at 436.

In the *Vitex* decision, the Third Circuit expressed "strong disapproval" of a Board meeting in which "the Governor's views on the role of Vitex in the economy of the Islands and the mainland" was discussed in the context of a certificate issued under Act No. 224. The Court urged that

> "the statute from which [the Board] derives its authority to act prescribes the standards to be applied by it in the conduct of its functions, which may not be disregarded merely because the Governor believes that other considerations should enter into its deliberations and recommendations."

Id. 5 V.I. at 436-37. Cf. 3 V.I.Op.Atty.Gen. 94, Op. No. 1954-57 (Nov. 24, 1957); 2 V.I.Op.Atty.Gen. 128, Op. No. 1951-16 (Feb. 23, 1951).

In light of the objective nature of the criteria under Act No. 224, the Board's revocatory powers, as set forth in Section 9(a)(3) of the statute, ensure that performance by Antilles will not, and indeed cannot, vary materially from performance by Delaware. For, any failure to comply with either the stated provisions of the Act or the rules and regulations issued in accordance therewith would subject the assignee to the loss of the certificate. Consequently,

the Restatement of Contracts does not prohibit the transferability of grants issued pursuant to the 1957 Act.[4]

Consistent with the general law of assignments which I have held applicable to the case before me, I find that the transfer of the certificate became effective immediately upon final acquisition by Antilles of all of Delaware's assets on April 6, 1965. Also in accordance with contractural principles of assignment, said transfer was valid without Board approval, thereby rendering unnecessary Antilles' applications for transfer on March 26, 1965 and September 27, 1968. On the date of effective transfer, Antilles became subject to revocatory powers of the Board; and although the record fails to disclose whether Antilles complied with the provisions of the Act from that date, I find that the onus was on the Government, via its powers of revocation, to initiate sanctions for failure to comply therewith. Inasmuch as the Board did not initiate revocation proceedings until April 28, 1969—more than four years after the transfer—the Government clearly neglected its above stated duty. Furthermore, since Antilles was not required under Act No. 224 to apply for the transfer, it cannot be faulted for either the subsequent withdrawal of its application or the three-year lapse prior to the renewal thereof.

III

Administrative Irregularities

From the foregoing, it is clear that the Board's determination that Antilles lacked standing to respond to the order to show cause why Delaware's certificate should not be revoked was erroneous. As a consequence, the Government

[4] Some courts have recognized that even personal service contracts traditionally the quintessential example of non-assignability under the common law, are assignable when no change in the employee's rights and duties are entailed. *See, e.g.*, Haldor, Inc. v. Beebe, 72 Cal.2d 357, 164 P.2d 568, 572 (Cal. App. 1945).

violated the clear procedural mandate of Section 14 of the 1957 Act, which provides that "[n]o tax or fee exemption or subsidy granted herein shall be revoked, modified, or rescinded, without notice and hearing . . ."

I now turn to plaintiff Antilles' allegation that the Board's action in denying its application for transfer was "arbitrary" as having no statutory basis therefor. *See* Act No. 224, § [illegible](b). Administrative action is deemed arbitrary.

> "if it is taken without any authority of law or upon a misconstruction of the statutory authority under which it purports to be taken . . ." (citations omitted).

In re Hooper's Estate, 3 Cir., 359 F.2d 569 at 575 n. 7. *See also* United States v. Carmack, 329 U.S. 230, 243-44 n. 14, 67 S.Ct. 252, 91 L.Ed. 209 (1946); 2 Am.Jur.2d (Admin. Law) §§ 620, 651.

Although the letter dated October 27, 1970, from Governor Evans to Antilles, in which the latter was formally notified of the rejection of its application for transfer, fails to state any reason therefor,[5] a prior letter from the Executive Director of the Board to Lt. Governor Maas is somewhat more informative:

> "This is to advise that the Industrial Incentive Board at Executive Session after careful consideration of the subject application found applicant (Antilles Industries, Inc.) ineligible to be the recipient of the requested transfer, and that *there is no active or outstanding business operation and grant on which to predicate a transfer* notwithstanding, eligibility of applicant."

[5] The Third Circuit has recognized that the exercise of the right of judicial review of administrative determinations is rendered practically impossible, or at least more difficult, when the agency's decision is not accompanied by express findings. *See* Morton v. Delta Mining, Inc., 495 F.2d 38, 42 (3d Cir. 1974).

Letter from G. Beretta, Dir. of Indus. Incentive Bd., to D. Maas, Government Secretary of Virgin Islands (July 22, 1970) (emphasis added). The minutes of the Board's closed executive meeting of November 4, 1969 further indicate that although other potential justifications for the denial of the transfer were discussed,[6] the Board's decision ultimately crystallized around the lack of a viable certificate to be transferred. Exec. Sess., V.I. Indus. Incentive Bd., Record at 19 (Nov. 4, 1969). Since it is uncontroverted that Delaware's certificate was never formally revoked, the Board is necessarily suggesting, albeit indirectly, that Delaware's dormancy constituted a revocation of its certificate as a matter of law. *See* Record, *supra* at 4-5. This argument was explicitly rejected by Judge Christian in Trumex Corp. v. Government of the Virgin Islands, Civ. No. 160/70 (D.V.I. 1970). Tumex, a processor of tungsten ore who was granted a tax exemption certification in 1964, closed operations and sold its plant in early 1966 due to financial difficulties. In upholding Tumex's claim for a refund of income and excise taxes paid for the year 1966, the Court found no authority either in language of the statute or in the legislative intent to support the Government's assertion that Tumex, by terminating its operations, had violated the statutory conditions of its grant and thereby forfeited any rights or benefits due to it under the Act.

Section 9(a)(3) of Act No. 224 provides for revocation of a tax or fee exemption for "failure of a person, firm or corporation to which such exemption or subsidy was granted to comply with the provisions of this Act and the rules and regulations issued in accordance therewith".

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[6] From the record, the Board appears to have considered two other reasons for denying Antilles' application for a transfer—(1) that Antilles did not in fact "need" the tax exemptions and subsidy benefits [*see* Record, *supra*, at 17]: and (2) the Governor had made a philosophical decision to limit the number of watch companies receiving said benefits [*see* Record, *supra*, at 6, 15].

No provision within Act No. 224 has been cited by the Government which would lend support, either directly or indirectly, to the Board's theory of automatic revocation by inactivity. Inasmuch as the Industrial Incentive Board of the Virgin Islands is an administrative agency and thus "a tribunal of limited jurisdiction" [Pentheny, Ltd. v. Government of the Virgin Islands, *supra* at 582], its authority to act is narrowly circumscribed by the statute reposing power in it. *Id. See also* Vitex Mfg. Co. v. Government of the Virgin Islands, *supra* at 435. It follows that the Board's action was without authority of law and, therefore, arbitrary.

JUDGMENT

In accordance with the foregoing Memorandum Opinion and the reasons set forth therein, it is hereby

Ordered, adjudged and decreed:

(1) That Antilles Industries, Inc. be deemed the lawful assignee of Delaware Watch Company's "Certificate for Tax or Fee Exemptions and Subsidies" granted to Delaware by defendant Government of the Virgin Islands on December 7, 1961.

(2) That said assignment be deemed effective on April 6, 1965, and that the benefits arising thereunder inure to plaintiff Antilles until December 16, 1970, the date of expiration of the certificate.

(3) That, following the submission by plaintiff Antilles to this Court of adequate documentary proof of payment thereof, defendant Government of the Virgin Islands refund to Antilles the following taxes accruing between the dates April 6, 1965 and December 16, 1970:

(a) one hundred percent (100%) of all excise taxes paid by Antilles but which should have been exempted;

(b) one hundred percent (100%) of all gross receipts taxes paid by Antilles but which should have been exempted;

(c) ninety percent (90%) of all import duties;

(4) That, upon submission of adequate documentary proof of Antilles' income tax liabilities for the period in question, defendant shall grant to Antilles a subsidy equal to seventy-five per centum (75%) of such liabilities actually paid or which shall be paid by Antilles and shall, if shareholders of Antilles qualify, grant the statutory subsidy to those qualifying shareholders in accordance with the provisions of Act No. 224, if any dividend income was received by said shareholders.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 75-1176 and 75-1458

ANTILLES INDUSTRIES, INC.

vs.

GOVERNMENT OF THE VIRGIN ISLANDS, et al.,
Appellants

(D.C. Civil Action No. 423-1970)

ON APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX, CHRISTIANSTED JURISDICTION

Present: ALDISERT, WEIS and GARTH, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Croix, Christiansted Jurisdiction and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed January 21, 1975, as amended April 10, 1975, as amended April 28, 1975, be, and the same is hereby vacated and judgment is entered for the defendants.

ATTEST:
/s/ THOMAS F. QUINN
CLERK

January 27, 1976

Certified as a true copy and issued in lieu
of a formal mandate on February 27, 1976.

Test: /s/ THOMAS F. QUINN

Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 75-1176 and 75-1458

ANTILLES INDUSTRIES, INC.,

Appellee

v.

GOVERNMENT OF THE VIRGIN ISLANDS; MELVIN H. EVANS Governor of the Virgin Islands; STANLEY FARRELLY, Chairman of the Virgin Islands Industrial Incentive Board, et al.,

Appellants

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by
Appellee

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Illegible
Judge

Dated: February 19, 1976

APPENDIX E

VIRGIN ISLANDS SESSION LAWS

(BILL 479)

No. 224

(*Approved July 5, 1957*)

To Encourage the Establishment of New Business and Industries—to Attract Investment Capital in order to further the Economic Development of the Islands—to promote Tourism and the Building of additional Hotels, Guest Houses and Housing Projects—through the Granting of Special Subsidies and for other Purposes.

WHEREAS is is deemed of great benefit to the people of the Virgin Islands, as well as to the economy of the Virgin Islands, to establish as many self-sustaining enterprises in the Virgin Islands as is practical—to attract additional investment capital—to promote tourism—to promote the building of hotels, guest houses, and housing projects—to the end that the economic life of the Virgin Islands may be as diverse and stable as possible, and the people of the Virgin Islands trained and employed in investments in finance, in modern techniques of production, mechanical skills, services and trades; and

WHEREAS it is deemed to be in the public interest to extend such inducements and render such aid as will encourage persons, firms and corporations to establish and develop new business enterprises; to make additional investment capital available to new and existing business; to promote tourism and the building of hotels, guest houses and housing projects.

Be it enacted by the Legislature of the Virgin Islands:

DECLARATION OF POLICY

Section 1. (a) In order to provide steady employment to the people of the Virgin Islands and provide training in

modern techniques of finance, investments, production, mechanical skills, services and trades, it is hereby declared to be of great benefit to the people of the Virgin Islands to have established in the Virgin Islands self-sustaining business enterprises; to have investment capital made available to new and existing business; to develop tourism to the fullest extent possible and to have hotels, guest houses and housing projects available for the many thousands of persons wishing to reside and to spend their vacations and holidays in the Virgin Islands.

(b) It is hereby declared to be of great benefit to the economy of the Virgin Islands to have such enterprises as are described in Section 1(a), established in that thereby greater numbers of Virgin Islanders will be trained, developed and employed.

(c) Through the establishment of such enterprises as declared in Section 1(a), the economy of the Virgin Islands will rest on a broader base.

(d) To achieve this objective, exemptions from payment of certain taxes or fees and the granting of special subsidies shall be allowed to new business enterprises and to such other persons and corporations as hereinafter provided, and

(e) In order that the encouragement tendered by this Act in the form of subsidies for the promotion of the business and industrial development of the Islands may be an incentive, having a real and unmistakably sure basis, the Government of the Virgin Islands hereby declares that it considers all orders granting subsidies and tax exemptions made available under the provisions of this Act as being in the nature of a contract or agreement between the Government of the Virgin Islands and the persons or corporations receiving the benefit of the subsidies or tax exemptions, and that it will not adopt any legislation which may impair or limit such subsidies or tax exemptions

granted hereunder or which may defeat the purpose of this Act.

Definition of New Businesses

Section 2. For the purpose of this Act, a person, firm or corporation shall be deemed to be engaged in a new industry if duly qualified to do any business in the Virgin Islands involving the manufacture, processing, creation or production of any articles or commodities, or the application thereof to a known unique process, which were not being manufactured, processed, created or produced within the said Islands prior to January 1, 1947, and in which industry at the time of granting tax exemption there is an actual and demonstrable capital investment of at least Ten Thousand ($10,000.00) Dollars. For the purpose of this Act, an article or commodity shall be deemed as being manufactured, processed, created, or produced within the islands prior to January 1, 1947, if it was being manufactured, processed, created or produced by an enterprise having at said time an actual and demonstrable capital investment of at least Ten Thousand ($10,000.00) Dollars. Provided that such article continues at the time of application to be manufactured, processed, created, or produced in the Virgin Islands.

Exemptions and Subsidies

Section 3. *New Businesses:* From and after the date of approval of this enactment, all persons, firms, or corporations shall, upon application thereof, as hereinafter provided, be granted exemption from the payment of taxes or fees and shall be eligible for industrial subsidies as specified in Section 6 of this Act, upon satisfactory proof that such person, firm or corporation is engaged in a new industry as hereinbefore defined, the said exemption and subsidies to last for a period of ten (10) years from the date of the order granting such exemption or subsidy; Provided, That application for tax or fee exemption and the granting

of subsidies under this Act shall be made not later than December 31, 1960; and Provided, further, That in the case of any enterprise engaged in the manufacture, creation, or production of more than one article or commodity, the exemption from payment of taxes or fees or granting of industrial subsidies shall be restricted and limited only to the portion of such enterprise as is not in competition with existing enterprises within the meaning and spirit of this Act.

HOTELS & GUEST HOUSES

Section 4. Each person, firm or corporation operating hotels and guest houses located in the Virgin Islands shall be eligible for tax or fee exemptions and the subsidies provided for in Section 6 of this Act; and for the purposes of this provision a hotel shall be considered any establishment for the accommodation of the public, including housing and feeding of paying guests and any cottage resort affording the above accommodations in which at the time of application for tax or fee exemption or for subsidy there is an actual and demonstrable capital investment of at least One Hundred Thousand ($100,000.00) Dollars, provided that application for tax or fee exemption and the granting of subsidies hereunder shall be filed not later than December 31, 1960. And, as an added incentive, each person, firm or corporation now operating a hotel and receiving subsidies or tax exemption under this Act or any previous tax exemption law shall, for each additional One Hundred Thousand ($100,000.00) Dollars invested by him or it in building additional accommodations and facilities to his or its hotel, receive tax exemptions and subsidies as provided for in section 6 of this Act, for an additional three (3) years, but in no event for more than a total of six (6) additional years.

APARTMENTS—HOUSING PROJECTS

Section 5. Each person, firm or corporation engaged in the business of constructing or operating apartment houses,

housing projects, industrial or commercial buildings, within the Virgin Islands, shall be eligible for the tax or fee exemptions and the subsidies provided for in section 6 of this Act; Provided there is a demonstrable capital investment of at least One Hundred Thousand ($100,000.00) Dollars; provided further that application for such subsidies and exemptions shall be made not later than December 31, 1960; and it is further provided, that no subsidies or exemptions shall be granted to any person for the construction of any home or dwelling to be occupied by himself or his family.

EXTENT OF SUBSIDIES & EXEMPTIONS GRANTED

Section 6(a). Each person, firm or corporation qualifying for tax exemptions or subsidies under sections 3, 4 and 5 of this Act shall be exempt from the payment of the following taxes and fees:

1. All property taxes.
2. All trade taxes or excise taxes on building materials, furnishings, and equipment necessary for the construction of any new business or industry.
3. All annual or specific fees, except liquor license fees and automobile license fees.
4. All gross receipts taxes, except that this exemption shall not apply to businesses operated by concession or rental agreement on the premises of persons, firms or corporations, including hotels, eligible for tax or fee exemption or industrial subsidy, for which businesses separate licenses are required or which, as determined by the Tax Exemption Board, are not ordinarily related to, or do not constitute an essential part of, the operation of the exempt or subsidized new businesses or industry, and which businesses are not otherwise eligible for exemption or subsidies as a distinct enterprise.

(b) Each person, firm or corporation qualifying under Sections 3, 4 and 5 of this Act shall also be entitled to receive a non-taxable subsidy in an amount equal to Seventy Five (75%) Per Cent of the Income Tax paid into the Treasury of the Virgin Islands and one hundred (100%) per cent of the import duties and other taxes on raw material brought into the Islands for processing, actually paid into the Treasury of the Virgin Islands by any such persons, firms, or corporations. This subsidy shall be granted over a period of ten (10) years, beginning with the establishment of the new business or enterprise.

(c) A non-taxable subsidy shall also be allowed for a period of ten (10)years as hereinabove set forth to all stockholders or partners of corporations and firms qualifying under Sections 3, 4, 5 and 7 of this Act in an amount equal to Fifty (50%) Per Cent of the Income Tax actually paid into the Treasury of the Government of the Virgin Islands on income derived by any such stockholders or partners from the operation of the business or industry covered under this law; provided, that said stockholders or partners are bona fide residents of the Virgin Islands.

(d) The period of ten (10) years referred to in this section shall be deemed to operate retroactively to include new businesses, industries and enterprises heretofore granted exemptions or subsidies in accordance with Bill No. 293, the Tax Exemption Ordinance of the Municipality of Saint Thomas and Saint John, approved January 25, 1954, as amended, or Bill No. 39, the Tax Exemption Ordinance of the Municipality of Saint Croix, approved January 7, 1952, as amended, or any other enactments antecedent of either; Provided, however, that nothing herein contained shall be construed to extend the period of any such tax-exemption or subsidy heretofore granted beyond the original period of such exemption or subsidy.

SECURITIES

Section 7(a). Each bona fide resident of the Virgin Islands and each firm or corporation organized and doing business in the Virgin Islands shall, for a period of ten (10) years from the enactment of this law, be entitled to a non-taxable subsidy each year in an amount equal to Fifty (50%) per cent of the Income Tax paid on that portion of his or its income, including interest, dividends and all other earnings, derived from the purchase, transfer, assignment or sale of stock, bonds and all other kinds of securities or debentures of whatever character, purchased or sold each year through an investment company located and authorized under the laws of the Virgin Islands to engage in such a business; Provided, that no more than One Hundred Thousand ($100,000.00) Dollars shall be paid as such subsidy to any one taxpayer in any one year; and, provided further, that the Commissioner of Finance shall, within a reasonable period of time after the tax on said income is paid, pay a first installment of not more than Fifty (50%) per cent of said subsidy which may be due to the taxpayer; the remaining installment of fifty (50%) per cent of the subsidy due to the said taxpayer shall be paid by the Commissioner of Finance within one (1) year after the first installment is paid, upon proper certification and proof furnished to him by the taxpayer that an amount equal to fifty (50%) per cent of the subsidy to which the taxpayer is entitled in said taxable year, has been invested in business ventures or projects located in the Virgin Islands whose objectives may further and enhance the economic development of the islands, such as: (a) bonds or other securities issued by the Government of the Virgin Islands; (b) stocks, bonds and mortgages and other securities on property and businesses located in the Virgin Islands; (c) the construction, operation, purchase or financing of land, hotels, apartments, homes, offices, industrial and all other types of buildings and structures in the Virgin Islands; and (d) the purchase, operation, establishment or financ-

ing of any existing or new businesses or projects which would further the economic development of the islands.

SALES OF SECURITIES

(b) No firm, company, or corporation shall, without first securing a license or authorization to engage in said business from the Government Secretary of the Virgin Islands, engage in an investment brokerage business for the purpose of buying and selling stocks, bonds, and other securities or debentures to and for others. No such license shall issue, unless the firm, company, or corporation deposits in a Reserve Account with a bank, designated by the Government Secretary, Fifty Thousand ($50,000.00) Dollars in cash or in interest-bearing United States Government Obligations.

(c) All persons, firms and corporations entitled to nontaxable subsidies pursuant to this Section shall annually, within 60 days after payment of his or its Income Tax, make application for said subsidies upon such forms and pursuant to such rules and regulations as the Commissioner of Finance shall prescribe.

PAYMENT OF SUBSIDIES—REPORT

Section 8. The Commissioner of Finance shall compute and determine annually the specific amount of the subsidy to which each person, firm or corporation granted a subsidy hereunder is entitled, and he is hereby authorized to make payment of said subsidy in each case to [sic] person, firm or corporation entitled to receive same from funds available in the special fund in the Treasury of the Virgin Islands, and the Legislature of the Virgin Islands shall appropriate sufficient funds in each annual budget to carry out the provisions of this Act.

TAX EXEMPTION BOARD—DUTIES & POWERS

Section 9(a). The provisions of this Act shall be administered by the Board of Tax Review heretofore created, which shall, for the purposes of this Act, constitute the Tax Exemption Board. Members of the Board shall be entitled to travel allowance and such other compensation as the legislature may provide.

All persons, firms or corporations entitled to tax benefits pursuant to Sections 3, 4 and 5 of this Act shall, within 60 days after payment of such taxes, make applications for tax or fee exemptions and for the granting of subsidies under this Act to the said Board. In the performance of its duties here under the said Board shall exercise the following powers and authority.

1. Conduct preliminary hearings, after due notice to all interested parties, with respect to applications for tax or fee exemption and for the granting of subsidies hereunder. At such hearings the Board shall determine whether the proposed applicant is qualified under the provisions of this Act. On the basis of its findings, and not later than sixty (60) days after receipt of application, the Board shall recommend to the Governor that the application be approved or disapproved, and in the event approval is recommended that a temporary certificate of tax or fee exemption, or qualification for subsidy be issued to the applicant conditioned upon actual compliance with the provisions of the law within a stated period.

2. Upon application of any person granted a temporary certificate in accordance with the preceding paragraph, or upon the expiration of any time limit set in such a certificate, as the case may be, the Board shall recommend to the Governor the final approval or disapproval of applications made hereunder; provided that if the Governor shall fail to either approve or

disapprove the applications within thirty (30) days after receipt of the Board's recommendation the same shall at the end of such period be deemed approved.

3. Recommend to the Governor, after notice and hearing, the revocation of any tax or fee exemption or denial of any subsidy for the unexpired portion of the period for which granted in the event of the failure of a person, firm or corporation to which such exemption or subsidy was granted to comply with the provisions of this Act and the rules and regulations issued in accordance therewith.

4. Hold hearings and investigations, subpoena witnesses, records and books and inspect tax-exempt properties and facilities upon due notice and promulgate such rules and regulations as may be necessary to implement the operation of the program.

(b) Decisions of the Board, as to questions of fact, shall be deemed final in any proceedings in any court except in such cases as it shall be conclusively shown that any such decision was arrived at by arbitrary or fraudulent means.

(c) The said Tax Exemption Board hereby created shall operate as an agency within the Department of Tourism and Trade or its successor, and it shall be authorized to employ such personnel from time to time as may be required to effectively administer and enforce the provisions of this Act.

(d) The Board shall prescribe the procedure for all applications for tax exemption and subsidies, and shall give public notice in all local newspapers published and of general circulation in the islands of all applications. Any person, firm or corporation interested in the approval or disapproval of an application may file a written statement with the Board prior to the hearing on such application.

GENERAL PROVISIONS

Section 10. Upon the recommendations of the Board tax or fee exemptions and subsidies as herein provided for shall be granted in the name of the Government of the Virgin Islands by the Governor of the Virgin Islands.

Section 11. Not less than seventy-five (75%) per cent of all persons employed in any new industry, subject to this law, shall be legal residents of the Virgin Islands. Provided, that the Board shall have the right to grant temporary permits to any new industry applying for or receiving benefits under this law to employ a greater percentage of non-residents of the Virgin Islands, when it is conclusively proven to the Board that residents with the necessary ability to perform the services required are not available within the Virgin Islands and the industry is or will be greatly handicapped as a result thereof; provided further that the Board shall revoke or modify the permit whenever it appears that the necessary services have become available within the Virgin Islands.

Section 12. Any person to be eligible to receive a non-taxable subsidy, pursuant to Section 7 of this Act, must be a registered voter and have his domicile in the Virgin Islands. Corporations to be eligible to receive the benefits of the provisions of this Act must be organized and established under the laws of the Virgin Islands.

Section 13. Trade or excise taxes or import duties or income tax payments made by persons qualifying under this Act shall be covered into a Special Account in the Treasury of the Virgin Islands to be designated as the 'Tax Exemption Fund'. The proper officers are hereby authorized, without further legislation, to make refunds of such taxes authorized under this Act from moneys in such special account.

Section 14. No tax or fee exemption or subsidy granted hereunder shall be revoked, modified, or rescinded without

notice and hearing and under such rules as may be promulgated by the Tax Exemption Board from time to time.

Section 15. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

Section 16. (a) The following laws and ordinances are hereby repealed: (1) Municipal Council of Saint Thomas and Saint John, approved September 11, 1945 (Bill No. 99); November 11, 1948 (Bill No. 291); June 25, 1949 (Bill No. 8); August 17, 1951 (Bill No. 67); July 7, 1953 (Bill No. 198); January 25, 1954 (Bill No. 293); February 16, 1954 (Bill No. 334); April 1, 1954 (Bill No. 349);

(2) Municipal Council of Saint Croix, approved June 25, 1949 (Bill No. 35); January 7, 1952 (Bill No. 39); December 30, 1952 (Bill No. 98); January 4, 1954 (Bill No. 96); September 24, 1954 (Bill No. 169);

(3) Act of the Legislature of the Virgin Islands, approved May 29, 1956 (Act No. 90).

(b) There is also hereby repealed all other laws, ordinances or parts thereof as may be in conflict with any of the provisions of this Act.

Approved July 5, 1957.

APPENDIX F

Restatement of Contracts
Ch. 7 §§ 150-151

§ 151. What Rights Can Be Effectively Assigned.

A right may be the subject of effective assignment unless,

(a) the substitution of a right of the assignee for the right of the assignor would vary materially the duty of the obligor, or increase materially the burden or risk imposed upon him by his contract, or impair materially his chance of obtaining return performance, or

(b) the assignment is forbidden by statute or by the policy of the common law, or

(c) the assignment is prohibited by the contract creating the right.

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§ 160. Delegation of Performance of a Duty or a Condition.

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(3) Performance or offer of performance by a person delegated has the same legal effect as performance or offer of performance by the person named in the contract, unless,

(a) performance by the person delegated varies or would vary materially from performance by the person named in the contract as the one to perform, and there has been no such assent to the delegation as is stated in § 162, or

(b) the delegation is forbidden by statute or by the policy of the common law, or

(c) the delegation is prohibited by contract.

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APPENDIX G

Opinion of the Attorney General

No. 1960-17

April 28, 1960

Dr. Roy H. Bornn
Chairman
Tax Exemption Board
St. Thomas, Virgin Islands

Dear Dr. Bornn:

I have your letter of March 2nd in which you request an opinion as to the transferability of a tax exemption or subsidy granted to an enterprise upon the event of a sale of the enterprise.

I have looked over the statutes governing the granting of exemptions and the making of subsidies to certain types of businesses. At no place is found an express prohibition concerning the transferability of such rights once vested in a business with the exception of those sections which provide for the revocation, modification or rescission of the exemption or subsidy upon certain conditions of non-compliance with the terms of the initial award.

It would seem then that in order to determine whether the intent of the Legislature was to affix this right unto the business itself rather than to the specific owner of the business, we must look to the declaration of intent as set forth by the Legislature.

A key idea expressed in 33 V.I.C. § 404 [1] and in previous declarations of policy in this type of legislation, is the idea that the purpose is to attract new capital to the Virgin Islands and to encourage the establishment of new industry and to promote and stabilize the economy of the Virgin Islands. Also, to have investment capital made available

[1] So in original. Probably should be § 4001.

to new and existing businesses. I think this declaration of policy pretty well solves the problem for the reason that investment capital to a certain extent is attracted by these promoting mechanisms of the local economy where the lender or financier participant expects to have a financial benefit not customarily found in competitive fields. This benefit, of course, is the making of certain exceptions to certain types of taxation and the granting of certain money payments to those businesses which qualify. If, therefore, an investor could look forward to the loss of the special rights upon the sale of the business, he would be far less willing to invest his money here. So, likewise, would be a future investor by way of a purchaser of an existing business. Upon purchase, he would lose the benefits of the original owner. Indeed, where a corporation is involved as the one named in the grant, the beneficial owner of the corporation is, of course, the shareholder. A share transaction in which the purchaser of a business instead of purchasing the assets, bought only the stock would probably not come to the attention of the Government. In the transfer of ownership by an individual or partnership, the stock transaction would not be possible. From the administrative standpoint the Legislature undoubtedly contemplated that the form of the business activity, whether individual, partnership, or corporate, was of no special importance since each was entitled to the grant where qualified.

It is our opinion, therefore, that the exemption and subsidy attaches to the business and not to the ownership and continues for the period of the award, subject to matters such as are contemplated by 33 V.I.C. § 4109(a)(3).

Respectfully,

RUSSELL B. JOHNSON
Attorney General